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In the Supreme Court of the United States

OCTOBER TERM, 1985

LEE M. THOMAS, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY,
AND THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, PETITIONERS

v.

OUTBOARD MARINE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9604, which authorizes the Environmental Protection Agency to take removal and remedial action when there is a release or substantial threat of release of a hazardous substance, provides the right to enter private property to design and implement the appropriate removal or remedy.

PARTIES TO THE PROCEEDING

The petitioners are Lee M. Thomas, Administrator of the Environmental Protection Agency, and the Environmental Protection Agency. The respondent is Outboard Marine Corporation.

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v.

OUTBOARD MARINE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency and the Environmental Protection Agency (EPA), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 773 F.2d 883. The opinion of the district court (App., *infra*, 16a-35a) is reported at 610 F. Supp. 1234.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 36a) was entered on September 23, 1985. A petition for rehearing was denied on November 25, 1985 (App., *infra*, 37a). On February 13, 1986, Justice Stevens extended the time

for filing a petition for a writ of certiorari to and including April 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

At issue in this case is whether Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C 9604, which authorizes EPA to conduct hazardous waste cleanup actions, provides the authority to enter private property when necessary to design and implement a cleanup action. The court of appeals held that Section 104 provides no such authority (App., *infra*, 13a-15a).

1. This case arises from EPA's efforts to remedy polychlorinated biphenyl (PCB) contamination on, and adjacent to, property owned by the Outboard Marine Corporation (OMC) at Waukegan Harbor, Illinois. OMC owns an industrial complex on property beside the Harbor, where it conducts manufacturing operations and has its corporate headquarters (App., *infra*, 2a, 17a). EPA contends that OMC is responsible for PCB contamination in a drainage ditch at the northern end of OMC's property, on approximately one third of OMC's north parking lot, and on other portions of OMC's property.[1] In addition, EPA contends that OMC released PCBs into Upper Waukegan Harbor (App., *infra*, 17a). EPA estimates that the site contains approximately 1.1 million pounds of PCBs.[2] This

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[1] A map of the site is found at App., *infra*, 15aa.

[2] Sediment samples at the site have been found to contain PCBs at concentrations ranging up to 500,000 parts per million. Current regulations issued pursuant to the Toxic Substances Control Act, 15 U.S.C. (& Supp. II) 2601 *et seq.*, require special handling and controlled disposal of materials contaminated with PCBs at concentrations of 50 parts per million or higher. 40 C.F.R. Pt. 761.

site is ranked 82d of 541 sites on the National Priority List of hazardous waste sites requiring cleanup action, and ranked as the number one priority site by the State of Illinois (App., *infra*, 1a).[3]

The United States initially sought to require OMC to remedy the contamination at this site. Suit was filed in March 1978, seeking mandatory injunctive relief under the Refuse Act, 33 U.S.C. 407, and the Clean Water Act, 33 U.S.C. 1251 *et seq.*, and seeking civil penalties under the Clean Water Act. Following the enactment of CERCLA in 1980, the United States on February 2, 1982, added a count for injunctive relief under Section 106(a) of CERCLA (42 U.S.C. 9606(a)), which authorizes the United States to seek such relief as may be necessary to abate the actual or threatened release of a hazardous sustance where there may be "an imminent and substantial endangerment to the public health or welfare or the environment."

In late 1982, rather than continue the protracted litigation seeking to compel OMC to clean up the site, EPA decided to conduct its own remedial cleanup, under the authority of Section 104(a) of CERCLA, retaining the option to sue OMC to recover cleanup costs under Section 107(a) of CERCLA, 42 U.S.C. 9607(a).[4] EPA accordingly conducted proceedings to evaluate remedial action alternatives for the Waukegan Harbor site, and on May 15, 1984, issued a Record of Decision selecting a remedy with

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[3] The National Priority List was compiled pursuant to Section 105(8) of CERCLA, which requires that the ranking reflect the degree of "relative risk or danger to public health or welfare or the environment" (42 U.S.C. 9605(8)). The list appears as Appendix B to the regulations implementing CERCLA (40 C.F.R. Pt. 300).

[4] That Section provides that any person who owns or operates any facility at which hazardous substances are disposed of by EPA or a state shall be liable for "all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan."

an estimated cost of approximately $21 million (App., *infra*, 18a). The remedy requires that sediments with the highest concentration of PCBs be excavated and transported off-site to a licensed waste landfill. The remaining sediments will be excavated and treated over a several-year period in temporary lagoons to be constructed on portions of OMC's "Harbor Front" property which do not require remedial action (*ibid.*). The treated sediments will then be stored permanently in a six acre containment cell to be constructed on a contaminated portion of OMC's north parking lot (App., *infra*, 3a-4a).

The United States on May 21, 1984, moved for voluntary dismissal without prejudice of its injunctive relief action. The district court granted the motion on February 6, 1985, conditioned on EPA's execution of a covenant not to sue under the remaining counts of the dismissed complaint, including the Section 106 CERCLA count (App., *infra*, 2a, 17a). The covenant, executed by EPA on April 23, 1985, expressly reserved the right of the United States to bring a cost recovery action under Section 107 of CERCLA following EPA cleanup (App., *infra*, 17a).[5]

2. In January 1985, EPA attempted to negotiate voluntary access to OMC's property to complete design plans and specifications for its selected remedy. When OMC refused, the United States on February 13, 1985, applied for and obtained a magistrate's ex parte warrant authorizing entry to complete the design phase only—denominated Phase 1—including: (1) a general walk-through of the exterior portions of OMC's property by the design team; (2) a survey to establish control monuments on the property, including placement of short pipe sections at ground level; and (3) a subsurface investigation requiring up to 23 soil borings (App., *infra*,

[5] OMC appealed the final order of dismissal (No. 85-1584 (7th Cir.)) That appeal has been briefed and argued.

3a, 17a-18a, 19a).[6] EPA did not seek, nor did the warrant authorize, access to implement the remedy—denominated Phase 2 (App., *infra*, 19a).

In its warrant application, EPA stated that there had been a release of PCBs into the environment at the Waukegan Harbor site, and that an on site remedial response was necessary to prevent PCB migration (App., *infra*, 5a, 19a). EPA relied on Section 104(a), (b) and (e) of CERCLA as authority to enter and conduct its planned design activities (*ibid.*).[7] The magistrate found that "reasonable grounds exist for an administrative entry pursuant to Section 104 of CERCLA (42 U.S.C. 9604); and for the issuance of an entry warrant" (CR-1, Exh. B, at 1). She accordingly issued the warrant for a period not to exceed 70 days (*id.* at 3).

3. OMC refused to honor the warrant and moved to quash (App., *infra*, 6a). After the magistrate denied the motion, OMC filed a complaint in the United States District Court for the Northern District of Illinois on

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[6] The walk-through would involve up to 16 persons and 7 automobiles; the surveying up to 3 persons and 1 van; and the subsurface investigation up to 17 persons and 16 vehicles, including drilling equipment (App., *infra*, 3a).

[7] Section 104(a) (42 U.S.C. 9604(a)) authorizes the President, through EPA, "to act * * * to remove * * * [any] hazardous substance * * * or take any other response measure" deemed necessary; Section 104(b) (42 U.S.C. 9604(b)) permits him to "undertake such planning * * * engineering * * * and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions." Section 104(e)(1) of CERCLA (42 U.S.C. 9604(e)(1)) authorizes entry "to inspect and obtain samples * * *." Section 104(e)(2) deals with the protection of "records, reports or information obtained from any person under this section" (42 U.S.C. 9604(e)(2)). The district court (App., *infra*, 29a) and the court of appeals (App., *infra*, 11a-12a) both held that Section 104(e) does not authorize entry for the design activities sought in this case. We do not contest that holding in this Court.

April 8, 1985, requesting a preliminary injunction enjoining the United States from executing the warrant, and seeking reversal of the magistrate's order denying the motion to quash the warrant (App., *infra*, 20a).

The district court denied OMC's motions for preliminary injunction and for reversal of the magistrate's action on April 30, 1985 (App., *infra*, 16a-35a). The court held that Section 104(b) of CERCLA authorized access for the specific design actions described by the warrant (App., *infra*, 30a). The court reasoned that "CERCLA's definitions make clear that the activities described [in Section 104(a)] as response, remedial, and removal necessarily include entry on the waste site" (App., *infra*, 22a).[8] The court concluded that: "The scope of response actions coupled with the presumption that waste sites will in many cases be privately owned, therefore, persuades the court that CERCLA allows the EPA entry to a privately-owned site for purposes of investigation and response" (App., *infra*, 30a).

4. On September 23, 1985, the court of appeals reversed and remanded the case for the grant of a preliminary injunction, on the ground that Section 104 of CERCLA (42 U.S.C. 9604) does not authorize entry to

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[8] The court pointed out (App., *infra*, 22a) that the term "remove," for instance, means "the cleanup or removal of released hazardous substances from the environment" (§ 102(23), 42 U.S.C. 9601(23)), which cannot be accomplished without site access, and the term also includes such on site actions as providing "security fencing or other measures to limit access, provision of alternative water supplies, [and] temporary evacuation and housing of threatened individuals not otherwise provided for" (*ibid.*).

The court also noted (App., *infra*, 22a-23a) that the definition of the term "remedy" includes "such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, [and] cleanup of released hazardous substances or contaminated materials" (§ 101(24), 42 U.S.C. 9601(24)).

private property for the requested design actions. The court also held that Phase 1 design cannot be separated from Phase 2 construction, and "EPA cannot clearly show that it will be entitled to enter the property to begin Phase 2" (App., *infra*, 14a-15a).

The court dismissed the authority provided by Section 104(a), the principal response section, as "merely a general grant of power for remedial action to protect the public health, welfare, or the environment" (App., *infra*, 10a). The court also rejected Section 104(b) as a basis for entry authority, virtually without analysis, on the incorrect assumption that "EPA itself has conceded that the source of its authority to enter for actual construction is unclear" (App., *infra*, 11a).[9] Hence, the court found, "[t]hat being so, it is difficult to conclude that Congress implicitly granted, rather than failed to grant intentionally or through oversight, a specific right of entry for response-planning operations" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals frustrates EPA's efforts to conduct hazardous waste cleanup actions under CERCLA. Despite the clear authorization by Congress in Section 104 to the Executive "to act * * * to remove * * * and provide for remedial action relating to [a] hazardous substance," and to undertake "investigations * * * as * * * appropriate to plan and direct [such] actions," the court of

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[9] The United States advised the district court and the court of appeals only that subsequent access to implement the remedy would require further judicial process, not that the right to such access is in doubt (see App., *infra*, 19a). The United States contemplated that more elaborate, adversarial proceedings would be appropriate to sanction the long-term, physically significant entry to construct the remedy.

appeals has held that EPA has no authority to enter private property to design and implement an appropriate remedy. The court's decision is directly contrary to the broad remedial purposes of CERCLA, to long-standing principles of statutory interpretation, and to decisions regarding other programs in which reasonable authority to implement a law enforcement mandate has been implied. The immediate effect of the decision is to halt all efforts to clean up PCB contamination at the Waukegan Harbor site. The decision, moreover, is also likely to have a direct and immediate impact on EPA's ability to clean up the other 48 sites on the National Priority List within the Seventh Circuit. 40 C.F.R. Pt. 300, App. B.[10] The decision also casts doubt on EPA's ability to conduct remedial actions at the hundreds of hazardous waste sites located in every other state across the country where there has been a release or there is a substantial threat of release.[11] Thus, the court of appeals decision merits correction by this Court.

1. a. In ruling that Section 104 (42 U.S.C. 9604) provides no right of access to private property to design or implement cleanup actions, the court of appeals has effectively restricted EPA's response authority, an essential part of CERCLA, to the detection of hazardous substances. While the decision apparently permits EPA to gain entry to determine whether there is an actual or threatened release, under authority of Section 104(b) (42 U.S.C. 9604(b)) (App., *infra*, 10a-11a), the agency cannot then remedy the problem absent voluntary cooperation from the property owner. Such cooperation is likely to be withheld, since the owner is typically the responsible party

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[10] An additional 25 sites in the Seventh Circuit have been proposed for inclusion on the List. 49 Fed. Reg. 40320 (1984); 50 Fed. Reg. 14115 (1985); 50 Fed. Reg. 37950 (1985).

[11] Defense counsel in a number of other CERCLA cases have already raised access issues based on the instant decision.

liable for costs of the cleanup under Section 107 (42 U.S.C. 9607), who has refused to conduct the cleanup himself. Nevertheless, in the court of appeals' view, while EPA can "identify the existence, extent, source, and nature of the hazard" (App., *infra*, 10a-11a), EPA must at that point leave the site; it cannot enter to complete design or to clean up the hazard.

In reaching this result, the court failed to observe one of the fundamental tenets of statutory construction, that courts construe an Act of Congress so as to "best serve the intended purposes of the statute." *Allis-Chalmers Mfg. Co.* v. *Gulf & Western Industries, Inc.*, 527 F.2d 335, 348 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976). *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). A court's "task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose" (*Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) (quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947)). In particular, a remedial statute such as CERCLA "should be liberally construed in order to effectuate the remedial purpose for which it was enacted." J. Sutherland, *Statutory Construction* ¶ 60.01, at 29 (4th ed. 1974); *Staten Island Rapid Transit Operating Authority* v. *ICC*, 718 F.2d 533, 541 (2d Cir. 1983); *International Nutrition, Inc.* v. *United States Dep't of Health and Human Services*, 676 F.2d 338, 341 (8th Cir. 1982).[12]

CERCLA's broad remedial mandate is to "get on immediately with the business of cleaning up the thousands of hazardous waste sites which dot this country." 126

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[12] The court below identified no legislative policy or remedial purpose supporting its narrow reading of the statutory language. Instead, it simply concluded that "Congress, possibly through oversight, neglected to provide for a right of entry" (App., *infra*, 11a).

Cong. Rec. 31964 (1980) (remarks of Rep. Florio);[13] S. Rep. 96-848, 96th Cong., 2d Sess. 8 (1980). While Section 104 (42 U.S.C. 9604) does not explicitly grant EPA a right of entry for remedial design or construction, it does authorize EPA to clean up privately-owned hazardous waste sites where there exists an actual or threatened release. Section 221(a) of CERCLA (42 U.S.C. 9631(a), in turn, establishes the Hazardous Substance Response Trust Fund (the Superfund) to finance EPA response actions under Section 104. It is inconceivable that Congress would create response authority, and fund it in the amount of $1.6 billion,[14] without intending that EPA be able to enter private property to undertake remedial action. Congress could not have intended that EPA would be left simply to hope that entry would be permitted by potentially responsible parties who have already refused to undertake appropriate remedial action themselves.[15]

In the court of appeals' view, EPA can obtain access, absent voluntary cooperation, only through the imminent and substantial endangerment provision of Section 106 (42 U.S.C. 9606) if the site presents such an endangerment (App., *infra*, 14a).[16] This is not, however, an adequate

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[13] There is no conference report for CERCLA; the primary sources of CERCLA's legislative history are the floor debates preceding adoption of the final bill by the Senate on November 28, 1980, and by the House on December 3, 1980, and the legislative histories of the original House and Senate bills (H.R. 7020, 96th Cong., 2d Sess., and S. 1480, 96th Cong., 2d Sess., respectively). Because Representative Florio was a sponsor of CERCLA, his remarks during the floor debate are entitled to substantial weight.

[14] See § 221(b), 42 U.S.C. 9631(b).

[15] A predicate of a Section 104 response action is a determination that the owner will not assume that obligation himself. 42 U.S.C. 9604(a)(1).

[16] The court of appeals incorrectly asserted that this case involved no imminent and substantial endangerment (App., *infra*, 4a). This

alternative; nor does it implement congressional intent. First, the standard for taking action under Section 106 is different from that under Section 104; EPA need not show an imminent and substantial endangerment under Section 104. In addition, although authorization of access is certainly part of the relief that a court may grant under Section 106, that Section is primarily intended as a means to compel private parties to conduct the clean-up, rather than to provide access for governmental cleanup efforts. Moreover, the Section 106 process can be cumbersome and lengthy, as demonstrated by the facts of this case. Congress passed Section 104 precisely to provide EPA with an alternative to seeking injunctive relief pursuant to Section 106. But the appellate court's cramped reading of

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issue was not before the court of appeals; the district court expressly refrained from adjudicating any factual issues, as there has been no evidentiary hearing (App., *infra* 16a).

Section 104(a)(1) of CERCLA (42 U.S.C. 9604(a)(1)) authorizes EPA to take response or remedial action whenever there is a release or substantial threat of release of either (A) a hazardous substance, or (B) any pollutant which may present an "imminent and substantial danger to the public health or welfare." EPA's warrant application relied solely on its determination, under Subparagraph A, that there had been a release of a hazardous substance. EPA did not invoke its authority, nor did the magistrate or district court address such authority, under the imminent and substantial endangerment standard of Subparagraph B. App., *infra*, 17a.

Moreover, the court of appeals improperly limited CERCLA's imminent and substantial endangerment provisions to "emergency" situations (App., *infra*, 14a). Nothing in CERCLA, however, confines this standard to "emergencies." To the contrary, a substantial body of caselaw expressly recognizes that an endangerment may be imminent and substantial even though harm may not be realized for years. See, *e.g.*, *United States* v. *Waste Industries, Inc.*, 734 F.2d 159, 165 (4th Cir. 1984); *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1109-1110 (D. Minn. 1982).

Section 104 has effectively restricted that congressionally provided alternative to the rare instances when voluntary access will be granted, at least with respect to privately owned sites.[17]

Section 104(a) authorizes EPA "to act * * * to remove * * * and provide for remedial action" for hazardous waste. This language alone, by necessary implication, authorizes EPA to enter private property to the extent necessary both to design and to implement the remedial action. EPA cannot fulfill its responsibilities without access, a fact ignored by the court of appeals' quick dismissal of Section 104(a) as "merely a general grant of power for remedial action" (App., *infra*, 10a). Congress's grant of this power is, in fact, the central purpose of Section 104, and the statute must be construed to make this remedial authority effective. Furthermore, as the district court correctly observed (App., *infra*, 22a-23a), CERCLA's definitional sections demonstrate that Congress intended to authorize access. Section 104(a) of CERCLA authorizes an EPA "response." "Response" includes "remedial action" (§ 101(25), 42 U.S.C. 9601(25)), which in turn includes "those actions consistent with permanent remedy taken instead of or in addition to removal action * * * to prevent or minimize the release of hazardous substances so that they do not migrate" (§ 101(24), 42 U.S.C. 9601(24)).[18] The term specifically *excludes* "offsite

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[17] Section 104 was evidently intended to apply to both private and public sites; it does not contain the distinction Congress explicitly drew between them where deemed warranted elsewhere in CERCLA. See Section 104(c)(3) (42 U.S.C. 9604(c)(3)) providing 90 percent EPA funding for cleanup of private sites, but 50 percent funding for state-owned sites.

[18] The district court also noted (App., *infra*, 22a-23a) that the statutory definition of "remedy" includes such necessarily on-site actions as "storage, confinement, * * * clay cover, neutralization, [and] cleanup of released hazardous substances or contaminated materials" (§ 101(24), 42 U.S.C. 9601(24)).

transport [or storage, or treatment] of hazardous substances" unless EPA determines that off-site actions are the most cost-effective (*ibid.*). Thus, CERCLA's definitions clearly contemplate on-site response actions under Section 104(a).[19]

Section 104(b) further provides that whenever EPA is authorized to conduct a response action, it may undertake "planning, * * * engineering, architectural, and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions." CERCLA's definitions of "response" and "remedial" again demonstrate congressional intent that such actions, where necessary are to be conducted at the site. All of the design work sought in this case pursuant to the warrant consists of "planning" and "engineering" studies or investigations; it thus fits precisely within the activities specifically authorized by Section 104(b).

The court of appeals, without analysis of the language or purpose of Section 104(b), nevertheless refused to apply this Section, based solely on its incorrect conclusion that EPA questioned its own authority to enter for Phase 2 construction. The court declined to infer a right of access

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[19] OMC further contended below that its Waukegan Harbor complex should be viewed as a grouping of separate facilities, some of which are contaminated and some of which are not (App., *infra*, 9a). Under this contention, Section 104(a) of CERCLA would authorize remedial action only at those portions of the overall property which are contaminated, and would not authorize construction of temporary treatment facilities on uncontaminated portions. This argument, however, is flatly contradicted by the broad language of Section 104(a), which authorizes EPA "to act," to "provide for remedial action relating to such hazardous substance * * *." There is no support in CERCLA for subdividing the property into smaller parcels, and restricting EPA's response powers to contaminated portions.

for response planning where it found none for implementation (App., *infra*, 11a).[20] Given Section 104(b)'s contemplation of on-site planning, however, and the fact that design access is critical to an effective response under Section 104(a), the court's holding is erroneous.[21]

b. In other contexts, the courts have not hesitated to engage in statutory construction where reasonably necessary to permit administrative agencies to carry out the tasks assigned to them by statute. For example, in

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[20] In concluding that there was no authority for access for Phase 2, the court of appeals incorrectly found it significant that EPA lacks explicit authority to condemn property. (App., *infra*, 13a). But a government activity that might effect a taking may be enjoined only if the particular activity lacks statutory or constitutional authorization. Here, EPA's response activities are authorized by CERCLA. If a property owner believes the exercise of government authority effects a taking, his proper course is not to seek equitable relief enjoining the alleged taking, but to file a suit for compensation under the Tucker Act, 28 U.S.C. 1491. Accordingly, the issue is not, as the court of appeals believed, whether an express condemnation power exists in the statute, but whether the statute or its legislative history expresses an unambiguous intention to withdraw the Tucker Act remedy for any taking that may occur in the implementation of the statute. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1017 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974); *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985). Here, CERCLA manifests no intent to withdraw recourse to the Tucker Act.

[21] OMC has also argued that because Section 104(e) explicitly provides a right of entry for the record inspection purposes specified in that Section, the absence of similar language in Section 104(b) demonstrates that Congress intended no right of entry for purposes of that Section. The district court correctly noted, however, that inspection of records can be accomplished without entry, while inspection of physical premises cannot be accomplished without entry. Thus, "there is a legitimate distinction between searches under § 104(b) and (e) justifying the latter subsection's explicit reference to the right of 'entry.' " App., *infra*, 29a-30a.

The district court's analysis similarly explains the absence of an ex-

United States v. *Euge*, 444 U.S. 707, 711 (1980), the Court held that while the tax code did not explicitly authorize the IRS to summon individuals to produce certain types of evidence, such authority "is necessary for the effective exercise of the Service's enforcement responsibilities." The Court concluded (*ibid.*) that "this Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities * * *, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." The court in *Blackie's House of Beef, Inc.* v. *Castillo*, 659 F.2d 1211, 1222 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982), similarly held that the right of the Immigration and Naturalization Service to enter commercial premises with a proper warrant to search out suspected violations of the immigration laws derived from its general statutory power to seek out and question suspected illegal aliens. See also *Lovgren* v. *John V. Byrne*, No. 85-5180 (3d Cir. Mar. 26, 1986), slip op. 11-12 (Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.* authorizing warrantless inspections of vessels, also implicitly authorizes federal warrantless dock inspections; otherwise, "the agency's efforts to gather accurate information would be substantially frustrated."). Cf. *Dalia* v. *United States*, 441 U.S. 238, 249-254 (1979)

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press entry provision in Section 104(a). Congress could not have intended through a single reference to entry for the limited purposes of Section 104(e) to have negated the broader remedial purposes of Section 104(a) and (b), which depend on entry for their implementation. We note in addition that Section 104(e) is an access and inspection provision substantially identical to those contained in other environmental statutes. See, *e.g.*, Section 3007 of the Resources Conservation and Recovery Act of 1976, 42 U.S.C. 6927.

(interpreting 18 U.S.C. 2518 to permit covert entry in order to install bugging devices; "[t]o read the statute otherwise would be to deny the 'respect for the policy of Congress [that] must save us from imputing to it a self-defeating, if not disingenuous purpose' " (421 U.S. at 254, quoting *Nardone* v. *United States,* 308 U.S. 338, 341 (1939)).

The right of entry to private property, consistent with constitutional limitations, is no less necessary to enable EPA to carry out its remedial responsibilities under CERCLA than the powers implied in the above cases were to the implementation of the statutory responsibilities of the agencies there involved. The entire logic of the statute compels the conclusion that such access to conduct design activities is implicitly authorized by both Section 104(a) and (b), and that access to implement EPA's cleanup actions is similarly authorized by Section 104(a).

2. Congress is currently considering funding reauthorization and program amendments to CERCLA which would explicitly confirm that EPA has access authority under Section 104.[22] Final enactment of an ap-

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[22] The Senate passed the Superfund Improvement Act on September 26, 1985, stating that EPA has authority to "enter * * * any * * * place or property * * * [where necessary] to determine * * * the appropriate response or to effectuate a response action under this title." H.R. 200., 99th Cong., 1st Sess. § 120(1)(B); 131 Cong. Rec. S12184, S12189 (daily ed. Sept. 26, 1985). The report accompanying the bill (S. Rep. 99-11, 99th Cong., 1st Sess. 26 (1985) states that:

> The Amendment confirms the broad access authority that Congress originally intended when CERCLA was enacted in 1980. * * * [E]ntry is permissible to determine * * * the appropriate response or to effectuate a response. Thus, government representatives * * * may not only enter sites of known or suspected releases themselves, but may also enter adjacent properties to determine whether a release or threatened release has occurred or to undertake other activities necessary to a response action.

The House passed the Superfund Amendments of 1985 on December

propriate access provision would supersede the court of appeals' decision in this case, making plenary review by this Court unnecessary. While there is congressional agreement as to site access, however, there is substantial controversy between the House and Senate over other provisions, particularly the method and level of funding. The prospects for and timing of final passage of the CERCLA amendments are thus uncertain. We will of course promptly inform the Court of any legislative action that may be taken that will affect this case.

10, 1985, also authorizing entry to determine "the need for response, or choosing or taking any response action under this title." Section 104(e)(1) and (e)(3)(D), 42 U.S.C. 9604(e)(1) and (e)(3)(D). 131 Cong. Rec. H11619, H11622 (daily ed. Dec. 10, 1985). Conferees agreed on an access provision on March 13, 1986, largely adopting the House version.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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APRIL 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 85-1753

OUTBOARD MARINE CORPORATION, PLAINTIFF-APPELLANT,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES.

Argued June 14, 1985

Decided Sept. 23, 1985

Before BAUER and WOOD, Circuit Judges, and GRANT, Senior District Judge.*

HARLINGTON WOOD, Jr., Circuit Judge.

The United States Environmental Protection Agency ("the EPA") has determined that there are deposits of the notorious chemical polychlorinated biphenyls, commonly known as PCBs, in certain areas of Waukegan Harbor, Illinois and an adjacent industrial complex owned by Outboard Marine Corporation ("OMC"), and that the blame lies with OMC. As a hazardous waste site, this area ranks high on the National Priority List and is the number one priority site in the State of Illinois. Even though the PCBs were discovered almost ten years ago, to date little has

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* The Honorable Robert A. Grant, Senior District Judge from the Northern District of Indiana, is sitting by designation.

been accomplished. This part of the controversy is concerned with the means chosen by the EPA to finally get started with remedial action.

Factual Background

OMC manufactures outboard motors, lawn mowers, and industrial and turf care vehicles at its industrial complex in the Waukegan Harbor area and at other locations in the United States and abroad. In addition to the manufacturing plant, OMC's Waukegan Harbor complex houses its corporate headquarters, central data processing facilities, and engineering operations.[1] Over two thousand people are employed at this site.

In 1976, the EPA announced that there were PCBs in the sediments at the bottom of Slip No. 3 and that OMC's operation was the source. Two years later the EPA brought suit against OMC, alleging that the PCBs in Slip No. 3 and in parts of OMC's North Property constituted a threat to the environment and seeking to compel OMC to remove the hazards. For the next seven years, the parties engaged in discovery which included samplings of OMC's complex and the harbor, and studies of the possible effects of PCBs. The EPA then moved to dismiss its case voluntarily. The district court, over OMC's objection, allowed the motion to dismiss without prejudice, but upon the condition that the EPA agree not to sue OMC except under the cost-recovery provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("the Act"), 42 U.S.C. § 9601 *et seq.*[2]

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[1] An unscaled plot is attached illustrating the OMC complex as designated. To give some idea of scale the portion designated as Harbor Front Property, which is not contaminated but which will be at least in part occupied, is a tract of approximately thirty acres.

[2] OMC appealed the dismissal and that appeal is now pending in this court.

The EPA is now, as permitted under the dismissal, seeking to institute its own remedial action under section 104 of the Act, 42 U.S.C. § 9604, with the opportunity to seek recovery for cleanup costs from the responsible parties under section 107 of the Act, 42 U.S.C. § 9607. In January, 1985, representatives of the EPA and OMC met to discuss EPA access to the OMC complex for design work purposes. In particular, the EPA sought to conduct a "walk-through" of the exterior portions of OMC's property, survey the site, set markers, and collect twenty-three soil borings. The EPA labels these preliminary activities as Phase 1, and claims that access is not presently sought for the purpose of implementing the actual remedy.

To better understand what Phase 1 amounts to, some detailed examination is necessary. The so-called "walk-through" is not a Sunday afternoon stroll. It would involve about sixteen persons and seven automobiles. The surveying would involve about three persons and one van, and the soil borings would involve about seventeen persons and sixteen vehicles. The equipment would include truck-mounted drill rigs, pickup trucks, vans, water trucks, automobiles, a waste hauler, a job trailer and possibly a bulldozer. Approximately 1,000 square feet of the parking lot would be needed to park the equipment. Survey monuments would be left in place to facilitate later construction. This EPA task force prepared to move in on OMC for a maximum of seventy days, a little over two months.

All of this is preliminary to the actual remedial operations which would involve dredging or excavating thousands of cubic yards of sediments from the harbor, north ditch and OMC parking lot, and transporting the material to the OMC Harbor front property for years of treatment in extensive lagoons and other facilities to be constructed by the EPA. Some of the remainder after

treatment would be permanently housed in a fifteen-foot high "containment cell" to be built on and to occupy six acres of the OMC parking lot. It is estimated that the construction of these EPA facilities on OMC property would take three and one-half years. From oral argument it appears that the EPA, itself without the power of eminent domain, is not certain how it will proceed to gain access to accomplish its actual remedial construction. The EPA informed us that Congress is considering an amendment to grant the authority to enter for actual construction which it seems unsure about under the present statute. We need not reach that issue.

Access at this time, however, is sought only to do the necessary surveying, soil testing for weight-bearing, and design specification work in preparation for the actual construction. The EPA does not contend that an emergency exists at OMC. There is no imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. If there is an emergency, it is almost ten years old.

This background summary brings us to the legal issue of how EPA access for Phase 1 may be obtained, and what recourse OMC may have for the threatened EPA invasion of its private property.

Acquisition of Access by EPA

After negotiations with OMC failed to voluntarily provide EPA the access it wanted for its preconstruction purposes, the EPA applied *ex parte* to a United States magistrate for a warrant for entry and investigation under sections 104(a), 104(b), and 104(e) of the Act, 42 U.S.C.

§ 9604(a),[3] (b),[4] and (e).[5] In the application for the warrant, among other things, the EPA informed the magistrate that PCBs existed at the site and that an on-site remedial response was necessary. The EPA stated it relied on section 104(e)(1) as most germane for its statutory right to enter the site to perform the field work necessary to prepare the design plans and specifications for the anticipated cleanup construction. The application recited the unsuccessful efforts to accomplish an access agreement with OMC.

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[3] Section 104(a) of the Act, 42 U.S.C. § 9604(a)(1), in materia! part provides:

> Whenever (A) any hazardous substance is released . . . into the environment . . . the President [through the EPA] is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance . . . or take any other response measure consistent with the national contingency plan which the President [through the EPA] deems necessary to protect the public health or welfare or the environment. . . .

[4] Section 104(b) of the Act, 42 U.S.C. § 9604(b), in material part provides:

> Whenever the President . . . has reason to believe that a release has occurred or is about to occur . . . he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions. . . .

[5] Section 104(e)(1) of the Act, 42 U.S.C. § 9604(e)(1), provides:

> (1) For purposes of assisting in determining the need for response to a release under this subchapter or enforcing the provisions of this subchapter, any person who stores, treats, or disposes of, or, where necessary to ascertain facts not available at the

On February 13, 1985, the magistrate, finding that grounds existed for an administrative entry, issued the requested warrant for the so-called Phase 1. When the EPA, armed with the warrant, appeared at OMC's door, admission was refused. After the magistrate denied OMC's motion to quash the warrant, OMC filed this suit seeking to enjoin the EPA from executing the warrant and to reverse the ruling of the magistrate denying the motion to quash the warrant. The district court, 610 F.Supp. 1234, denied OMC's motions for reversal of the magistrate's action and for a preliminary injunction, and took under advisement the EPA's motion to dismiss. The district court examined the issues and, reading the statute broadly, reasoned that since warrants have issued for violation-detection

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facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall, upon request of any officer, employee, or representative of the President, duly designated by the President, or upon request of any duly designated officer, employee, or representative of a State, where appropriate, furnish information relating to such substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances. For the purposes specified in the preceding sentence, such officers, employees, or representatives are authorized—

(A) to enter at reasonable times any establishment or other place where such hazardous substances are or have been generated, stored, treated, or disposed of, or transported from;

(B) to inspect and obtain samples from any person of any such substance and samples of any containers or labeling for such substances. Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee, or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or person in charge a receipt describing the same obtained and if requested a portion of each such sample equal in volume of weight to the portion retained. If any analysis is made of such samples, a copy of the result of such analysis shall be furnished promptly to the owner, operator, or person in charge.

searches, which this is not, but which are as intrusive as the planning search at issue here, the use of the same or similar warrant procedure in this instance was a sensible interpretation of an otherwise ambiguous statute. Even so, the district court considered the use of the warrant, referred to as a search warrant, to be at least unusual and without precedent, and so it seems to be.

The EPA reminds us that the denial of a preliminary injunction will be reversed only for an abuse of discretion, *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 390 (7th Cir.1984), and contends there was no such abuse here. The EPA argues that OMC has failed to show any irreparable harm and disparages OMC's efforts to equate the proposed design activities with actual implementation of the cleanup remedy. It is the EPA's position that the alleged irreparable harm is no more than some temporary inconvenience to OMC which the EPA will attempt to minimize. The irreparable harm, the EPA argues, will be to the EPA and the public interest if the injunction is granted.

The EPA further contends that OMC has failed to show any likelihood of success on the merits. This, the EPA argues, is because Phase 1, the design activity, is distinct from Phase 2, the actual construction. The EPA, although not conceding that Phase 1 constitutes an unequivocable taking, recognizes that the district court, for the purposes of OMC's motion, assumed that it constituted a taking triggering the "just compensation" requirement of the Fifth Amendment. To answer that claim, the EPA points out that governmental activity that would effect a taking may be enjoined *only* if the particular activity lacks statutory or constitutional authorization. *See Ruckelshaus v. Monsanto Co.*, ___ U.S., ___, 104 S.Ct. 2862, 2882, 81 L.Ed.2d 815 (1984); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 595-96, 72 S.Ct. 863, 889-890,

96 L.Ed. 1153 (1952) (injunction issued because activity unauthorized). It is the EPA's position that the Tucker Act, 28 U.S.C. § 1491, is the appropriate remedy for any authorized taking, and that compensation need not precede the taking, again relying on *Monsanto*, 104 S.Ct. at 2880. Although the EPA does not claim to have explict eminent domain authority, it argues that whether it does or does not is not the test. The EPA explains that the inquiry should be whether the particular statute or its legislative history expresses an unambiguous intention to withdraw the Tucker Act remedy for any taking that may occur in the implementation of the statute. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126, 95 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974); *Monsanto,* 104 S.Ct. at 2882.

OMC, not surprisingly, does not agree with many of the EPA's contentions. In OMC's view, it sought by its application for preliminary relief only to maintain the status quo pending discovery and a hearing on the merits. OMC claims it will be irreparably harmed if the EPA is permitted to enter pursuant to the *ex parte* warrant and take a sizeable tract of its property which itself is not claimed to be contaminated in violation of its rights under the Fourth and Fifth Amendments to the Constitution. OMC relies upon *Schnell* v. *City of Chicago,* 407 F.2d 1084, 1086 (7th Cir.1969), and *Henry* v. *Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir.1960), in support of its argument that irreparable harm necessarily flows from a constitutional violation. OMC disclaims any injury to the public or the EPA from a temporary stay and points to the government's own delay of many years in moving to solve the problem. OMC disputes the view that the EPA can enter its private property for its remedial design purpose which is considered by OMC to be part of the EPA's anticipated construction project.

OMC does argee that in certain circumstances the Tucker Act provides a legal remedy to parties suffering injuries from authorized governmental actions, but argues that the Tucker Act does not determine whether a government agency has substantive authority for its actions. That authority, OMC says, must be found in the legislation under which the agency acts, principles of eminent domain law, and constitutional restraints. By use of the warrant, the EPA, OMC stresses, has the support of the magistrate's contempt powers. OMC concedes that there is no evidence in the Act that Congress intended to withdraw Tucker Act relief, but that, it argues, is because Congress never conceived of the possibility that the EPA would try to take private property for a treatment plant and dump site for wastes from other areas. The Tucker Act, it argues, gives relief only for authorized governmental actions and this proposed EPA entry is totally unauthorized by statute.

It is OMC's position that the Act permits only remedial actions at facilities, 42 U.S.C. § 9604(a), and further that it permits only non-contiguous areas to be designated as a single facility or site, 42 U.S.C. § 9604(d)(4), if they both satisfy the definition of facility. 42 U.S.C. § 9601(9). OMC views its complex as separate sites, some contaminated, some not. Relying upon this statutory background, OMC contends that Congress intended to permit the remedy of environmental hazards only at actual waste sites; Congress did not intend to authorize construction of a large EPA project on private uncontaminated property which is in daily use by the owner. OMC charges that for the first time in this court the EPA refers to its actions as a feasibility study rather than, as originally claimed by the EPA in its warrant application and as found by the district court, a field investigation to design the remedy, take borings, and leave survey monuments for construction.

DISCUSSION

We respect the resolution by the district court of this troubling and novel problem, but we take a different view of the EPA's actions and authority no matter how necessary or well-intentioned. Seeking the linchpin of the issue, we must carefully examine the statute the EPA primarily relies upon for its authority to enter for its specified purposes.

Recognizing as it must its present lack of clear authority to enter the property to begin actual remedial construction, but hoping in the meantime for some congressional relief or for an order of some sort from some court, the EPA has ingeniously separated out a part of the actual construction, calling it Phase 1. That, it appears, is to permit the EPA to get started on the remedial project without its lack of authority being so obvious. The EPA is alone in denying that surveying the site, placing survey monuments, locating utility lines, and taking weight-bearing subsurface test samples of soil are not, as a usual and practical matter, the customary first things to be done at a construction site. They are too construction-related to be labeled a mere walk-through, or to be considered as authorized under the ordinary and preliminary investigative provisions of the statute discussed below. But even if that not be so, the EPA still lacks authority to enter as the warrant adds nothing when the statute provides nothing.

Section 104(a), the principal response section, is merely a general grant of power for remedial action to protect the public health, welfare, or the environment. Section 104(b) provides the authority, when there is reason to believe that a release has or is about to occur, to investigate, monitor, survey, test, and do other necessary information gathering to identify the existence, extent, source, and nature of the

hazard. This part of the statute is not now involved, however, as these purposes have already been accomplished at the OMC site.

In addition, section 104(b) grants the general authority to "undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations" as are deemed necessary or appropriate "to plan and direct response operations." The district court found implicit in section 104(b) a right of entry for the purpose of planning response operations. Finding that the removal and remedial actions that comprise permissible response actions necessarily require access to the waste site, 42 U.S.C. § 9601(23) and (24), and that response-planning investigations also require access to the waste site, the district court in effect concluded that because the EPA needed access to the site to fulfill its responsiblities Congress must have implicitly granted the authority to enter. We respectfully disagree. The EPA itself has conceded that the source of its authority to enter for actual construction is unclear. Congress, possibly through oversight, neglected to provide for a right of entry for this purpose. The EPA believes that it must petition a federal court to exercise its equitable powers to grant a right of entry. That being so, it is difficult to conclude that Congress implicitly granted, rather than failed to grant intentionally or through oversight, a specific right of entry for response-planning operations.

In its application for a warrant, the EPA cited section 104(e)(1) as most germane for its warrant purposes and set forth what in its view constituted the material parts of the section:

> For purposes of assisting in determining the need for responses to a release under this subchapter or enforcing the provisions of this subchapter, . . . such [EPA] officers, employees, or representatives are authorized

> (A) to enter at reasonable times any establishment or other place where such hazardous substances are or have been generated, stored, treated, or disposed of, or transported from;
>
> (B) to inspect and obtain samples from any person of any such substance. . .

The EPA's selective quoting of that section better suits its purposes than does the full statute, but even the EPA version is only of limited help as the need for a response has already been determined. The language for the "purpose[] of . . . enforcing the provisions" of the subchapter also adds nothing specific. What the EPA omitted in its warrant application from that section plainly limits its authority to enter, whatever its broad language, to the "purposes specified in the preceding sentence." The preceding sentence refers to the necessity that any person who has had some involvement with the hazardous substance furnish information relating to such substance and permit EPA access to any records pertaining to the substance. A reading of the full section set forth in footnote 3 puts the authority in context, and deflates the EPA's selective and expanded reading of the section. It is germane to the application, as the EPA asserts, not for what the section says, but for what the section does not say. The power to enter at reasonable times is not given to begin any response construction, or even for design and surveying purposes, if we assume they are to be separated. The authority to enter to inspect and obtain samples, gather information, and inspect records is limited to the hazardous substance itself; the section does not provide authority for taking subsurface samples to determine what construction can be supported or for the other things the EPA seeks to accomplish as preliminiary to construction.[6]

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[6] We further note that the authority to enter is limited to establishments or other places where the hazardous materials have

On those three sections the EPA rests its authority to have a warrant issued for its right of entry for extended design purposes on tracts of private ground which are not themselves alleged to be a part of the hazard. Putting aside whether leaving survey markers in place after this "walkthrough" has any bearing on whether a taking has occurred, it appears that what the EPA actually seeks is what in the usual context would be construed as a temporary easement to enter and cross over private ground for its particular purposes. An easement ordinarily is a property right not necessarily available upon demand but may require condemnation. In highway improvement matters, for instance, where the government may seek to eliminate a dangerous curve, a temporary detour over private property, if not voluntarily given, can only be acquired by condemnation. The "quick take" variety permits the condemnor to secure the use of the property immediately upon payment into court of the appraised value, with the final damage amount to be determined later at trial. That may be what EPA needs and does not have. Only Congress, not we, can supply that power.

But, EPA argues, never mind, we have an open ended right to enter where we please to fulfill any of our obligations to the public and the bill should be sent by the private owner not to us but to the government in care of the Tucker Act. Then if we were authorized to enter as we claim, says the EPA, and if in fact what we did actually amounted to a taking, then you, the owner, may recover any damages incurred. Otherwise, thank you very much for the several months' use of your land.

Regardless of the noble purposes of the EPA, at least in nonemergency situations, that procedural approach strains our usual constitutional concepts. In our view, the

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been generated, stored, treated, disposed of or transported from. It is at least questionable whether the uncontaminated tracts at issue here fit into those permissible categories.

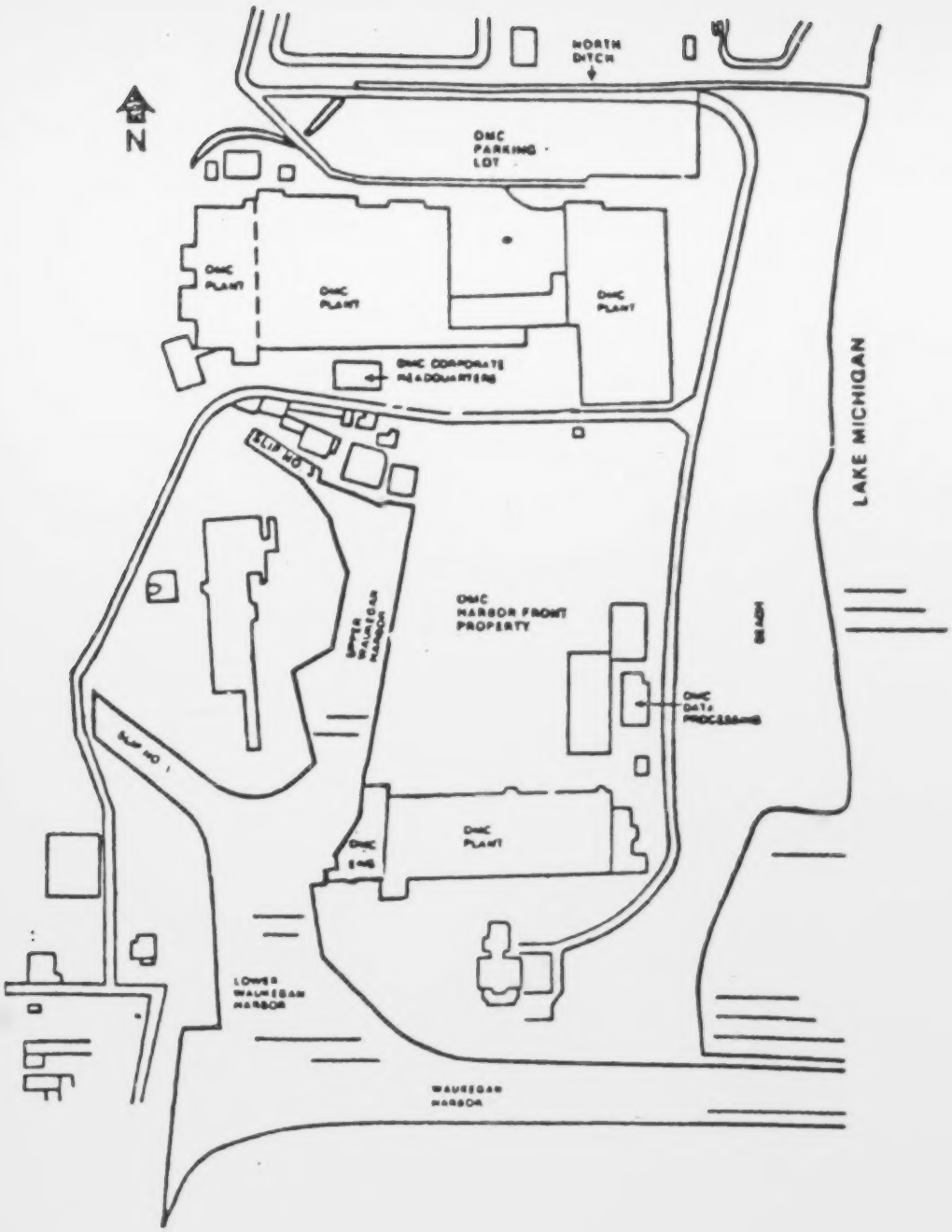
sections relied upon by the EPA do not give it the authority to do that which it seeks to do and which the magistrate and the district judge permitted. The statute is not as ambiguous as it is lacking. We cannot, out of a zeal to rid our environment of its hazards, rewrite the statute for the EPA. Congress is very capable of doing that. That congressional capability is demonstrated by this very statute. Under section 106, 42 U.S.C. § 9606, when the EPA determines "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, [the EPA] may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require." This grant of power, however, applies only in emergency situations. The statute in that event gives the district court broad jurisdiction. The EPA would read out the emergency precondition and seek the same power for its lesser, nonemergency functions, a power which Congress nowhere in the statute bestows upon them. The EPA's powers were circumscribed by a discriminating Congress. We cannot ignore the fact that Congress did not bestow certain powers that it demonstrated it knew how to bestow when it saw the need. Perhaps congressional failing to provide for the circumstance which we face was a mere oversight, but this court is not a committee to consider statutory amendments.

Even if Phase 1 is to be separated from Phase 2, it is doubtful that the EPA should be judicially given access at this time to enter to prepare for its intended construction project. As of now the EPA cannot clearly show that it will be entitled to enter the property to begin Phase 2. The

EPA seeks, however, to avoid consideration of the next step, but consideration cannot wait as the relationship between the two phases is too close.

The EPA needs help to accomplish its purposes, but the help it needs must be sought elsewhere. The EPA has no authority to do what it wants to do, and the Tucker Act neither gives that authority to the EPA, nor a remedy to OMC.

Reversed and remanded for the grant of the preliminary injunction sought by OMC pending a hearing on the merits. Circuit Rule 18 shall not apply.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DMC CORPORATE HEADQUARTERS
SLIP NO 1
LAKE MICHIGAN
DMC HARBOR FRONT PROPERTY
BEACH
DMC DATA PROCESSING
SLIP NO 2
DMC PLANT
LOWER WAUKEGAN HARBOR
WAUKEGAN HARBOR

APPENDIX B

UNITED STATES DISTRICT COURT, N.D. ILLINOIS, E.D.

No. 85 C 3287

OUTBOARD MARINE CORPORATION, PLAINTIFF,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANT.

April 30, 1985

MEMORANDUM OPINION AND ORDER

GETZENDANNER, District Judge:

This action is before the court in part on appeal from the March 20, 1985 order of Magistrate Joan Lefkow issued in the case of *In the Matter of Outboard Marine Corporation,* No. 85 M 030. 28 U.S.C. § 636(b)(3); *General Rules of the United States District Court, Northern District of Illinois* 2.44. The complaint also seeks a preliminary injunction. As no fact-finding hearing has yet been convened, the court must assume as true all well-pleaded allegations in the complaint. For the reasons stated below, the motions for preliminary injunction and for reversal of the Magistrate's order are denied.

FACTUAL ALLEGATIONS

This action concerns the efforts of the Environmental Protection Agency ("EPA") and its Administrator, Lee M. Thomas, to remedy the problem of polychlorinated bi-

phenyl ("PCB") contamination of Waukegan Harbor and surrounding areas of Waukegan, Illinois. The Outboard Marine Corporation ("OMC") owns an industrial complex on property near Waukegan Harbor. (Complaint ¶ 12). The EPA has charged that OMC is responsible for the presence of PCBs in a drainage ditch and a parking lot on OMC's property (the "North Property"). (*Id.* at ¶ 16.) The EPA has further charged that OMC is responsible for PCB contamination of property not owned by OMC, specifically the Upper Harbor and Slip No. 3 of Waukegan Harbor. (*Id.*) Waukegan Harbor is a navigable body of water servicing several industries and recreational docking facilities. (*Id.* at ¶ 15.)

Over the past several years, the EPA has sought ways to address the problem of PCB contamination in Waukegan Harbor and on OMC property. It first sought relief under various federal statutes, including the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 ("CERCLA"), in a suit pending before this court, *United States* v. *Outboard Marine Corporation, et al.*, 78 C 1004. On February 6, 1985, this court granted EPA's motion voluntarily to dismiss that action. The dismissal, however, was without prejudice to the EPA's rights to conduct its own remedial response to the contamination under CERCLA § 104, 42 U.S.C. § 9604, and to sue those responsible for the contamination under CERCLA § 107, 42 U.S.C. § 9607.

Allegedly acting under the authority of CERCLA § 104, the EPA is now attempting to clean up the PCBs in the North Property and Waukegan Harbor. The first phase of this cleanup involves access to OMC's property in order to conduct field investigations necessary for the design of the remedy. Specifically, this phase ("Phase 1") contemplates a walk-through design visit to the Waukegan Harbor Hazardous Waste Site, as well as a surveying visit and a subsurface investigation visit (requiring about 23 soil-

borings). The EPA estimates that these visits should take no more than 70 days. The walk-through visit will involve at least 16 persons and 7 vehicles; the surveying at least 3 persons and 1 vehicle; and the subsurface investigation at least 17 persons and 16 vehicles. (*Id.* at ¶¶ 45–48 and Exhibit A. With regard to Phase 1, OMC claims:

> The activities EPA seeks to perform under its warrant will cause substantial disruptions to OMC's operations by impeding OMC's access to its parking lot, plants and all of the Harbor-front property. The presence of EPA workers dressed in protective garb will have an adverse psychological impact on OMC's employees.

(*Id.* at ¶ 48.)

OMC also complains of Phase 2 of the EPA's planned action, which constitutes the actual remedy for the contamination. According to OMC, the EPA's remedial plan would seriously intrude on OMC's property. Specifically, the EPA plans to implement a dredging and removal action at a cost of $21 million and a duration of 3½ years. (*Id.* at ¶¶ 26–31). This action would involve, among other things, the removal of sediments from the North Property and Slip No. 3 and the treatment of those sediments in lagoons that will be constructed on OMC property. The site chosen for the lagoons is known as the "Harbor-front Property," a thirty-acre property owned by OMC which is not contaminated with PCBs. (*Id.* at ¶¶ 27–28.) Additionally, the EPA proposes to store the treated PCBs permanently on OMC's parking lot (part of the North Property) in a six-acre "containment cell" to be built by the EPA. (*Id.* at ¶ 29.)

Exhibit G of the complaint, a "Conceptual Site Layout" prepared by the EPA, shows the proposed locations of the structures such as the lagoons and the containment cell, to be built on OMC's North and Harbor-front Properties. OMC alleges that the removal operations will release

PCBs into the air and water of and around Waukegan Harbor; require nearly 100 daily truck-trips on OMC's property; eliminate the water intake necessary to OMC's operations; damage OMC's utility lines and data processing facilities; cause pyschological harm to OMC's more than 2,000 employees; render useless 30 acres of OMC's property during the operations; and contaminate OMC's Harbor-front Property.

According to the complaint, on February 13, 1985, EPA agents obtained an administrative warrant in an *ex parte* application to Magistrate Lefkow. The warrant, attached as Exhibit B to the complaint, authorized the EPA to enter the Waukegan, Illinois property of the Outboard Marine Company ("OMC") in order to conduct the Phase 1 activities described above. The warrant does not allow the EPA access to OMC property for purposes of carrying out Phase 2. At the April 24, 1984 status hearing before this court on this matter, the EPA stated that it could not use a warrant to gain entry for Phase 2. EPA's attorney stated that some sort of equitable action in federal district court would be used to gain this type of access.

In the warrant proceedings, Magistrate Lefkow considered the affidavits of EPA employees Rodney Lynn and Danial M. Caplice as evidence that a release or threatened release of a hazardous substance had occurred on the OMC premises in Waukegan. The Magistrate further found that representatives of OMC had refused EPA agents access to the OMC premises for purposes of conducting Phase 1 activities. (The EPA concedes that the access is not designed to investigate whether a violation of law did or is about to take place, or to determine whether OMC is in compliance with the law.) After making such findings, the Magistrate found authority for the contemplated entry in CERCLA § 104, and granted the warrant for the limited purpose of conducting Phase 1 activities.

On February 14, 1985, the day after the warrant issued, EPA agents sought entry to OMC property in Waukegan. Also on that day, OMC moved to quash the warrant. In a written opinion attached as Exhibit C to the complaint, the Magistrate denied the motion to quash on March 20, 1985. On March 21, 1985, OMC filed an emergency appeal of the ruling on the motion to quash, pursuant to Local Rule 2.44. A stay of the warrant was issued by the Emergency Judge, Chief Judge Frank McGarr, on March 21, 1985. On April 8, 1985, the present complaint for injunctive relief and for an appeal was filed. District courts have jurisdiction to review the decision of a magistrate to issue a warrant. *General Rules, supra*, at 2.44; *Weyerhaeuser Co.* v. *Marshall,* 592 F.2d 373, 377 (7th Cir.1979); *In the Matter of Sauget Industrial Research and Waste Treatment Association* v. *Marshall,* 477 F.Supp. 88, 90 (S.D.Ill.1979).

In Count I of its complaint, OMC contends that conduct of Phase 1 or Phase 2 activities on its property without authority granted by condemnation proceedings constitutes an uncompensated taking of its property and a deprivation of property without due process of law, both in violation of the fifth amendment to the federal constitution. In Count II, OMC claims that issuance of the warrant violated the federal fourth amendment, as it was issued without a finding of probable cause and in an *ex parte* hearing. As such, the warrant constituted an unreasonable search and seizure. These alleged constitutional violations have and continue irreparably to harm it. Moreover, OMC alleges other damages, such as loss of business, will result from the warrant and harm it irreparably. As relief, OMC requests the court to issue an order:

1. Quashing the warrant issued February 13, 1985;
2. Enjoining the EPA and Thomas from executing said warrant;

3. Reversing the Magistrate's March 20, 1985 ruling that denied Outboard Marine Corporation's motion to quash the warrant; and

4. Granting OMC such other and further relief as the Court deems proper.

(Complaint fol. ¶¶ 60, 70.)

APPLICABLE CERCLA PROVISIONS

CERCLA was designed to remedy hazardous waste sites, specifically abandoned or "orphan" dump sites. *United States* v. *Wade*, 546 F.Supp. 785, 792 (E.D.Pa.1982), *appeal dismissed*, 713 F2d 49 (3d Cir. 1983). It gives the EPA broad powers to clean up such sites. Section 104, the provisions under which the EPA justifies its present actions, provides that whenever any hazardous substance is released, or there is a substantial threat of release,

> the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance . . . at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner of the . . . facility from which the release . . . emanates. . . .

CERCLA § 104(a), 42 U.S.C. § 9604(a). Subsection (b) of § 104 provides that when the President is authorized to act under subsection (a),

> he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the

> existence and extent of the release. . . In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

Subsection (e) establishes a right of access to a facility from which a release has emanated or is emanating for purposes of inspecting records and taking samples. Such access must be allowed to the President or his agents upon his request.

CERCLA's definitions make clear that the activities described above as response, remedial, and removal necessarily include entry on the waste site. To "respond" means to engage in actions defined as removal or remedial. CERCLA § 101(25); 42 U.S.C. § 9601(25). To "remove" means to clean up or remove and to dispose of the released substance. CERCLA § 101(23), 42 U.S.C. § 9601(23). The definition of "remove" continues:

> The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, [etc.]

Id. "Remedy" or "remedial action" includes actions consistent with a permanent remedy, which may be taken in addition to or instead of removal. CERCLA § 101(24); 42 U.S.C. § 9601(24); *Lone Pine Steering Committee* v. *United States Equal* [*sic*] *Protection Agency*, 600 F.Supp. 1487, 1498 (D.N.J.1985) (removal v. remedy). For purposes of CERCLA, "remedy" includes, but is not limited to,

> such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization,

> cleanup of released hazardous substances . . . recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment and incineration, [etc.]

After reponding to a waste site, the EPA may seek reimbursement for the costs of the response action from the responsible party. CERCLA § 107, 42 U.S.C. § 9607. It is clear from the statute that judicial review of the EPA's decision to respond to a waste site can be had only after the response action is commenced or completed. *United States* v. *Outboard Marine Corp.,.*, 104 F.R.D. 405, 411 (N.D.Ill.1984); *Lone Star*, 600 F.Supp. at 1495; *Aminoil, Inc.* v. *United States Equal* [*sic*] *Protection Agency*, 599 F.Supp. 69, 71 (C.D. Cal.1984). The statute is designed to allow the EPA to respond quickly to a hazardous waste site, and to impose liability later only after a full hearing and review of the EPA's actions.

Discussion

While OMC's allegations refer to both Phases 1 and 2 of the EPA's response action, the court finds that the present action for preliminary injunctive relief concerns only the imminent Phase 1 activities. Even had the EPA not conceded in court that Phase 2 activities could be undertaken only with court order—at least in a case such as this involving private property on which business activities are conducted—the warrant that OMC asks the court to quash permits access only for Phase 1 activities. Moreover, the EPA is not now seeking access for Phase 2 activities, and hence preliminary injunctive relief is not appropriate. Declaratory relief may be the appropriate vehicle regarding the EPA's power to carry out Phase 2; yet a request for such a declaration may be premature in light of the EPA's

admission that a court order is necessary therefor. In any event, the propriety of such a declaration regarding Phase 2 need not be examined on the expedited schedule necessary regarding the imminent Phase 1 activities.

For purposes of this motion, and accepting as true OMC's factual allegations, the court will assume that the activities of Phase 1 would constitute a "taking" such that the fifth amendment's requirement of "just compensation" is triggered. U.S. Const. amend. V; Tucker Act, 28 U.S.C. §§ 1346, 1491; *see generally Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (discussing fifth amendment implications of permanent and temporary physical invasions of real property). The court will also assume that Phase 1 will entail a deprivation of property, such that the due process requirements of the fifth amendment are implicated.

A. Taking Without Just Compensation

As mentioned above, the court assumes for this motion only that Phase 1 will entail a taking of OMC property. However, it is clear that the fifth amendment prohibits only takings without just compensation or for a non-public use. Where just compensation is provided, the takings clause is not violated. *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 697 & n. 18, 69 S.Ct. 1457, 1465 & n. 18, 93 L.Ed. 1628 (1949). The Supreme Court has clearly indicated that

> [e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. . . . The Fifth Amendment does not require that compensation precede the taking.

Ruckelshaus v. *Monsanto Co.*, ____ U.S. ____, 104 S.Ct. 2862, 2880, 81 L.Ed.2d 815 (1984) (footnote and citations omitted). The parties accept the principle that the Tucker

Act allows an action in the Claims Court in which compensation for an authorized taking is sought. The availability of the Tucker Act remedy is presumed, upon a showing of the above-mentioned factors (that the action was authorized and for a public use), unless Congress has manifested an intent to withdraw that remedy. *Id.* at 2881. OMC does not cite to any statutory provision of legislative history demonstrating such a withdrawal here. The court finds none in its own examination of the statute. Congressional failure to mention or allow recourse to the government for compensation alone cannot "reflect an unambiguous intention to withdraw the Tucker Act remedy." *Ruckelshaus*, 104 S.Ct. at 2882. Hence, if otherwise proper, the taking contemplated here is compensable under the Tucker Act.

OMC additionally does not argue that the taking is for a private use. Considering the broad definition of public use—which is basically coterminus with the sovereign's police powers, *Hawaii Housing Authority* v. *Midkiff*, ___ U.S. ___, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984); *Ruckelshaus*, 104 S.Ct. at 2879—such an argument on the present allegations would be unavailing.

OMC does vigorously assert, however, that the court may enjoin the Phase 1 activities. This conclusion rests on two independent arguments. First, as the taking is unauthorized, according to OMC, no compensation would be allowed therefor under the Tucker Act. Hence, to allow the EPA to conduct Phase 1 activities would effectually sanction an uncompensated taking by the EPA. Since it is clear that principles of sovereign immunity are not offended by court-ordered specific relief against activities by federal officials that are *ultra vires* (outside the scope of their statutory authority or conducted pursuant to an unconstitutional statute), an injunction is an appropriate remedy in this case. *United States* v. *Lee*, 106 U.S. 196, 219-20, 1 S.Ct. 240, 259-60, 27 L.Ed. 171

(1882); *Larson* v. *Domestic & Foreign Commerce Co.*, 337 U.S. 682, 695-97, 69 S.Ct. 1457, 1464-65, 93 L.Ed. 1628 (1949); *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1522 (D.C.Cir.1984), *petition for cert. filed*, 53 U.S.L.W. 3671 (March 4, 1985)* (No. 84-1398). Second, a monetary remedy would not sufficiently compensate OMC for the taking.

The court rejects the second argument, regarding the inadequacy of monetary compensation. The principle behind this argument is supported by the majority *en banc* decision of the District of Columbia Circuit in *Ramirez*. However, even accepting the principle enunciated in *Ramirez*, the court finds the present allegations insufficient to support injunctive relief based on inadequacy of remedy.

In *Ramirez*, the government had seized a substantial portion of land owned by a United States citizen in Honduras. The land was converted into a military base for purposes of military training. In addition to the expropriation of the land, the government conducted activities such as military exercises and the firing of weapons. Several head of cattle were shot by stray bullets. The landowners and their employees, living on the remaining portion of the land, felt their lives endangered by these activities. In finding that the activities should be enjoined preliminarily, the

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* On May 20, 1985, after this opinion was issued, the United States Supreme Court granted the petition for a writ of certiorari and summarily vacated the judgment. ____ U.S. ____, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985). The Court remanded the case to the District of Columbia Circuit "for reconsideration of its opinion and judgment in light of the Foreign Assistance and Related Programs Appropriations Act (Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984), Pub.L. No. 98-473 Section 127 and other events occurring since October 5, 1984."

Court discussed the availability of a Tucker Act remedy. Assuming that such a remedy was available, the Court noted that its adequacy was also an issue:

> It is clear . . . that when the monetary compensation available through the Tucker Act is so inadequate that the plaintiff would not be justly compensated for the seizure of his property by the United States, an injunctive remedy is not barred by sovereign immunity. . . . Other decisions . . . assume either explicitly or implicitly that the *adequacy* of the Tucker Act remedy is an issue; and that the gross inadequacy of money damages could justify injunctive relief when money alone would not constitute just compensation.

Ramirez, 745 F.2d at 1527 (footnote omitted and emphasis original). In effect, the Court ties the definition of "just compensation" to the adequacy of monetary compensation. This court can conceive of situations in which no amount of monetary compensation would be constitutionally sufficient. *Ramirez* might be such a case, where the taking of property involved endangering human life. Yet, these situations are few; the test for inadequacy of the legal remedy for eminent domain purposes is not coextensive with that for general equitable purposes. To hold otherwise would severely limit the scope of the United States' eminent domain power. As the dissenting opinion in *Ramirez* pointed out: "When monetary compensation would not constitute 'just compensation,' the taking could not be effected." *Id.* at 1552.

While OMC may have a stronger argument at Phase 2—where PCB's arguably would be released and could endanger the health of OMC workers—that monetary compensation is unconstitutionally inadequate, that argument does not succeed at Phase 1. Accepting as true OMC's allegations concerning the harms connected to Phase 1, all are economic in nature. The Tucker Act remedy would satisfy fully the commands of the fifth amendment.

OMC's other argument is that the unauthorized nature of the EPA's actions would render the Tucker Act unavailable. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), establishes that Executive power must stem "either from an act of Congress or from the Constitution itself." *Id.* at 585, 72 S.Ct. at 866. The EPA does not argue a right of entry stems from the constitution. Rather, it claims that provisions of CERCLA authorize its Phase 1 activities.

Statutory provision for exercise of the power of eminent domain need not state explicitly that such power may be exercised. Rather, the statute must authorize the action from which a taking may stem. *Cf. Ruckelshaus,* 104 S.Ct. at 2880 & n. 19. The District of Columbia Circuit, in a case on which OMC relies heavily, explains the test as follows:

> Whether an action of Executive officials is sufficiently authorized by congressional or constitutional provision to permit a claim under the Tucker Act depends upon the nature of the facts of the particular case and the scope of the defendants' lawful powers. Not all illegal acts of government officials are considered unauthorized for the purpose of determining the government's liability to pay compensation under the Tucker Act. The question in each case is whether the defendants' actions are substantially in compliance with the powers granted to them by congressional statute or constitutional provisions. Recovery under the Tucker Act has been permitted when a taking by an officer is a natural consequence of congressionally approved measures or the result of an exercise of discretion granted to an official for the implementation of a congressional statute.
>
> However, when an officer acts wholly outside the scope of [these powers], the official's actions have been considered to be unauthorized for the purposes of a damages remedy under the Tucker Act.

Ramirez, 745 F.2d at 1523 (footnotes omitted).

Acting without statutory power at all, or misapplying one's statutory power, will result in a finding that such action was *ultra vires*. It is clear additionally that acting without constitutional authority will support a denial of a Tucker Act remedy. *Id.* at 1522-23; *see also id.* at 1551 n. 3 and 1554 ("the question whether a government officer was acting sufficiently within his authorized powers to permit a Tucker Act remedy is precisely the same as the question whether he was acting sufficiently within his powers to preclude injunctive relief against him") (dissenting opinion of Judges Scalia, Bork, and Starr). Regarding the claim that the contemplated action is unauthorized, therefore, the court must ask whether the intended action is authorized by statute or constitution.

In this case, the EPA is seeking entry to OMC's property. Regarding statutory right of entry, the EPA first argues that subsection (e) specifically allows a right of entry for Phase 1 activities. The court accepts OMC's argument that § 104(e) concerns only entry for the examination of records and taking of samples. OMC argues further that the absence of a right of entry in § 104(b) (allowing for planning investigations) coupled with the reference to such a right in § 104(e) establishes that CERCLA provided no right of entry for on-site inspections and response actions.

The absence of a reference to right of entry in § 104(b) does not strike the court as significant. Inspection of records and documents can be accomplished without entry, such as through the less intrusive administrative subpoena duces tecum. At least one court has found that a provision allowing "access" to documents but not entry for purposes of examining documents, did not allow the enforcement agency to obtain a search warrant for purposes of entering the premises and inspecting the documents. *Midwest Growers CoOp Corp.* v. *Kirkemo*, 533 F.2d 455, 462 (9th Cir.1976) (agency must follow congressionally

established injunctive proceeding in order to gain access to records). Unlike inspection of documents, inspection of physical premises cannot be accomplished through administrative subpoena. Thus, there is a legitimate distinction between searches under § 104(b) and (e) justifying the latter subsection's explicit reference to the right of "entry."

Having determined that § 104(e)'s reference to entry does not preclude inferring a right of entry under § 104(b), the court must examine whether the statute supports such an inference. The scope of remedial and removal actions that comprise permissible response actions, as described in § 101, necessarily includes access to the waste site. In addition, violation-detecting investigations (including surveys and monitoring) and response-planning investigations require access to the site. OMC does not argue that the statute was designed to remedy only government-owned sites. While the statute addresses the problem of abandoned sites, many of them will be on privately-owned property. The fact that the OMC site is privately owned and still occupied, then, does not take it out of CERCLA's scope.

The scope of response actions coupled with the presumption that waste sites will in many cases be privately owned, therefore, persuade the court that CERCLA allows the EPA entry to a privately-owned site for purposes of investigation and response. The statute is silent, however, on the mechanism by which access is to be achieved. Subsection (e) provides that access must be allowed on demand, but no similarly descriptive language exists in § 104(a) or (b).

The court's own research reveals no case exactly on point. Of the many reported CERCLA decisions, most do not involve a waste site on which the owner is conducting business. This may explain the lack of precedent on the issue of EPA access to private property. The closest case

factually is *Industrial Park Development Company* v. *Environmental Protection Agency*, 604 F.Supp. 1136 (E.D.Pa.1985), since it concerns a dispute by the EPA and the property owner over which should conduct cleanup activities. In that case, it appears that the EPA simply entered the land, without warrant or judicially-granted authority. However, the case is not legally helpful.

Courts have addressed the issue of an administrative agency's remedy where a statute allows a right of entry but provides no mechanism to accomplish it. The Ninth Circuit has held that where a statute provides a right of entry, an *ex parte* administrative warrant may be used to obtain entry. *Midwest,* 533 F.2d at 462; *Bunker Hill Company Lead and Zinc Smelter* v. *U.S. Environmental Protection Agency,* 658 F.2d 1280, 1285 (9th Cir.1981); *In re Order Pursuant to Section 3013(d) RCRA,* 550 F.Supp. 1361, 1364 (W.D.Wash. 1982). OMC relies on *Midwest* for the proposition that where a statute provides a right but not a remedy, the court may infer only a civil injunction action to enforce the right. However, in *Midwest,* a comparable provision in the same statute concerning access to records specifically provided for an injunction as the method of enforcing the right to access. Hence, congressional intent to allow only an injunction action was clearly present in that statute.

These principles persuade the court that an administrative warrant may be the vehicle for conducting a violation-detection search under § 104(b). OMC next argues that a warrrant is not the proper vehicle for a response-planning investigation. According to OMC, a warrant is designed to allow an investigation for a specific legal violation when supported by probable cause or for an investigation pursuant to reasonable and neutral standards for purposes of monitoring legal compliance. The court agrees that the use of a warrant to plan the response, after the violation has been established, is unusual in light of

the common understanding of the purposes of a search warrant. The EPA has not provided the court, and the court's own research does not reveal, an example of a warrant being used in a situation such as this.

Yet, the Phase 1 activities do constitute a search. Moreover, Phase 1 (for which a warrant is sufficient) and Phase 2 (for which the EPA concedes a court order is necessary) are distinguishable for purposes of determining the extent of due process required before their execution. At Phase 1, the EPA will examine the feasibility of its projected cleanup; the investigation may result in a reversal of its conclusions regarding the appropriateness of Phase 2. Since warrants have issued for violation-detection searches as intrusive as the planning search desired here, *In re Order, supra*, the use of the same procedure for both types of searches is a sensible interpretation of an otherwise ambiguous statute.

This perception is supported by the court's interpretation of the issues that would be relevant in a hearing before any type of § 104(b) search. Whether the search is to plan a response or to determine the need for a response, the issues to be aired before a warrant or injunction authorizing entry are severely circumscribed by the statute. The finding of a violation and the choice of a response are issues that cannot be litigated until the cost-recovery suit, if any. The EPA may conduct any type of § 104(b) search when authorized to act under § 104(a), namely, when a hazardous substance is released. Because the EPA's determination is not subject to judicial review, the pre-search inquiry is whether the EPA has made such a determination. Thus, the type of inquiry to be made for a response-planning search is the same as that necessary for a violation-detection search. Both involve issues traditionally presented to magistrates in administrative search warrant proceedings: allegations that a legal violation on

the premises brings into play government regulatory power. In such a proceeding, the neutral magistrate takes evidence on the cause for the search (probable cause or neutral monitoring procedures), reviews the scope of the search for reasonableness, and examines the legal authority for the warrant. The warrant itself and the Magistrate's March 20, 1985 opinion denying the motion to quash reveal that these steps were followed. (See also the EPA's undisputed recitation of the evidence the Magistrate had before her in the warrant proceeding. United States' Reply, filed 4/22/85, pp. 15-16.)

Thus, the court agrees with the EPA's interpretation of CERCLA, to which it must grant deference, *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), that a warrant proceeding is a proper vehicle for obtaining entry under § 104(b) for all purposes. The final issue regarding statutory authorization is whether the proceeding should have been of an adversary or *ex parte* character. OMC contends that an *ex parte* hearing may only be used to obtain a warrant when administrative goals require a surprise appearance. This proposition has been rejected by at least one circuit. *Bunker Hill Company*, 658 F.2d at 1285. Again, the court agrees with the EPA that an *ex parte* proceeding was constitutionally sufficient, although an adversary proceeding would be preferable. This conclusion flows from the limited nature of the issues before the Magistrate. It is significant, additionally, that in OMC's voluminous papers, there is little indication of what evidence or arguments it would have presented to the magistrate. OMC does note that it would have told the Magistrate that there are no PCBs on the Harbor-front Property. However, the EPA did not represent that PCBs were on that property. And, it cannot be argued that the EPA is limited in its planning investigation only to those areas contaminated by PCBs. Since the response authority includes the construction of on-site

structures, the search of appropriate areas contiguous to contaminated areas, especially where the contaminated areas are bodies of water, for purposes of such construction is proper.

The court therefore finds that CERCLA authorizes both the requested search and the procedures by which the EPA sought entry to the premises to conduct the search. Since CERCLA authorizes the use of an *ex parte* administrative warrant for purposes of carrying out its duties under § 104(b), recourse to a magistrate to obtain the warrant was also proper. 28 U.S.C. § 636(b)(3); *General Rules, supra,* at 1.70(B)(L)(M); 2.40(a). This supports the existence of a Tucker Act remedy. Hence, the takings clause does not support OMC's motion.

B. Search and Seizure

Regarding the fourth amendment, the court finds that the previous discussion established no such violation here. OMC's allegations regarding the scope of Phase 1 establish that EPA representatives will carry out soil borings and surveying activities. The intrusion, however, is reasonable given the goal of the investigation and the public interest involved. Moreover, the Magistrate's warrant is sufficiently definite and limited in scope. At least one other court has determined that a warrant similar to that issued here is constitutionally sound. *In re Order, supra.* Finally, the warrant was issued after the Magistrate heard evidence of the contamination and the EPA's intended response action. This provided sufficient statutory authority for the search. The court therefore rejects OMC's fourth amendment argument.

C. Deprivation of Property Without Due Process

The court has noted that it will assume that Phase 1 involves a deprivation of property triggering the fifth amendment's requirement of due process. The amount of

process due attendant to any particular deprivation is variable. The factors to be considered are the private interest affected by the official action, the risk of erroneous deprivation of the interest through the procedures used and the probable value of additional procedures, and the government's interest (including the fiscal and administrative burdens) that the additional requirement would entail. *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Neither party has addressed the *Mathews* factors. However, the court's own examination persuades it that OMC has not shown a likelihood of success on the merits of the issue. *Roland Machinery Co.* v. *Dresser Industries*, 749 F.2d 380 (7th Cir. 1984).

The question is whether the *ex parte* warrant proceedings provide sufficient process for any deprivation attendant to the Phase 1 search. The court has already determined that the inquiry in a warrant proceeding under § 104(b) is limited and simple. OMC has not explained the value of an adversary proceeding for purposes of preventing an erroneous deprivation under these circumstances. Moreover, the government interest in executing the search is substantial. While the court accepts OMC's allegation that the deprivation involved in Phase 1 is substantial as well, this does not overcome a failure to explain the value of additional process. The court therefore finds a lack of likelihood of success on the merits of the fifth amendment claim. For this reason, the court will not grant an injunction based on OMC's claim of a violation of due process rights.

Conclusion

OMC's motion for reversal and motion for preliminary injunction are denied in full. The government's motion to dismiss is taken under advisement.

It is so ordered.

APPENDIX C

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 85-1753

OUTBOARD MARINE CORPORATION, PLAINTIFF-APPELLANT,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES.

No. 85 C 3287

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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Judge Susan Getzendanner

September 23, 1985

Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. HARLINGTON WOOD, JR., Circuit Judge, Hon. ROBERT A. GRANT, Senior District Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable Robert A. Grant, Senior District Judge from the Northern District of Indiana, is sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 85-1753

OUTBOARD MARINE CORPORATION, PLAINTIFF-APPELLANT,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES.

Nos. 85 C 3287 and 85 M 030

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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Susan Getzendanner, *Judge.*

November 25, 1985

Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. HARLINGTON WOOD, JR., Circuit Judge, Hon. ROBERT A. GRANT, Senior District Judge*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause on November 6, 1985, by defendants-appellees, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant, Senior District Judge from the Northern District of Indiana, is sitting by designation.

APPENDIX E

Statute Involved

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 provides in pertinent part (42 U.S.C. 9601, 9604 and 9606):

§ 9601. Definitions.

For purpose of this subchapter, the term—

* * * * *

(23) "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, * * * such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for * * *.

(24) "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term

includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, on-site treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment * * *.

* * * * *

The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions [meet specified criteria];

(25) "respond" or "response" means remove, removal, remedy, and remedial action;

* * * * *

§ 9604. Response authorities.

(a)(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange

for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

* * * * *

(b) Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to

plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

* * * * *

(e)(1) For purposes of assisting in determining the need for response to a release under this subchapter or enforcing the provisions of this subchapter, any person who stores, treats, or disposes of, or, where necesary to ascertain facts not available at the facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall, upon request of any officer, employee, or representative of the President, duly designated by the President, or upon request of any duly designated officer, employee, or representative of a State, where appropriate, furnish information relating to such substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances. For the purposes specified in the preceding sentence, such officers, employees, or representatives are authorized—

(A) to enter at reasonable times any establishment or other place where such hazardous substances are or have been generated, stored, treated, or disposed of, or transported from;

(B) to inspect and obtain samples from any person of any such substance and samples of any containers or labeling for such substances. Each such inspection shall be commenced and completed with reasonable promptness.* * *

* * * * *

§ 9606. Abatement actions.

(a) In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

* * * * *

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